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Supreme Court

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United States

October Term 1978

NO. 78-570

PREMIER CORPORATION,

Petitioner,

vs.

SHEVIN, SHAPO & SHEVIN, P.A.

Respondent.

(Premier Corporation vs. Julio Serrano)

RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

PAUL A. LOUIS, ESQ.
Sinclair, Louis, Siegel & Heath
Alfred I. duPont Building
Miami, Florida
(305) 374-0544

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Shevin, Shapo & Shevin, P.A., Respondent, replies to the Petition for Writ of Certiorari filed herein by Premier Corporation.

OPINIONS BELOW

The first order of the District Court, Southern District of Florida is unreported but appears in the Appendix attached to the Petition.

The first order of the United States Court of Appeals for the Fifth Circuit is unreported but was entered 28 August 1975 and appears at Page 270 of the Court of Appeals Appendix. The second order of the United States Court of Appeals for the Fifth Circuit is reported at 565 F.2d 1353 (5th Cir. 1977).

The second order of the District Court is unreported but appears in the Appendix to the instant Petition.

The final order of the Court of Appeals is reported at 578 F.2d 566 (5th Cir. 1978).

JURISDICTION

The final order affirming the award of attorneys' fees to Respondent was entered by the United States Court of Appeals for the Fifth Circuit on August 17th, 1978. Petitioner asserts an attempt to invoke jurisdiction under 28 U.S.C. §1254(1).

SYMBOLS

The following symbols are utilized in this Brief: (APP.) for reference to the Appendix included in the Petition; (A) for the original Appendix prepared for use in the Court of Appeals; (SA) for reference to the Supplemental Appendix prepared in the Circuit Court proceedings; "Class Counsel" refers to the Respondent as named herein; "F.R.C.P." refers to the Federal Rules of Civil Procedure.

QUESTION PRESENTED

Introduction: Prior Determinations and Modus Operandi

Settlement of this class action was achieved four days prior to its scheduled trial on the merits. On 4 September 1975 Premier Corporation, extolling the numerous virtues of the negotiated class settlement, agreed to ". . . pay a reasonable attorneys' fees to Shevin, Shapo & Shevin, as attorneys representing the certified class". (A 285).

The amount of that fee was to be "set by the Court at a subsequent hearing on the evidence presented." (A 285).

Thereafter, the District Court scrupulously received and considered evidence regarding the settlement proposal, as required by Rule 23, F.R.C.P. Included amongst the Court's many findings in approving the settlement was this: "a significant benefit is conferred upon the members of the Class by Premier's agreement to be obligated for the attorneys' fee for the class members' counsel. . . ." (A 294).

On evidence presented thereafter, the District Court awarded an attorneys' fee in the amount of $125,000.00 (A 1-4). Petitioner now seeks to evade its solemn obligation to pay the reasonable fee awarded by the District Court by charging Respondent with abusive tactics such as infidelity to the Class it represented, utilization of the class action as a vehicle to force Premier into a settlement solely with the Class Representative and improper use of a so-called "Mary

Carter" agreement in violation of Rule 23, F.R.C.P., in order to restrict testimony of a witness. These charges are *false*.

Petitioner has urged its claims and arguments in two prior courts, on five separate occasions. When Premier failed to adduce competent substantial evidence to sustain its claims, both courts below refused to dignify the charges, and implicitly rejected them by, respectively, awarding and affirming the award of a substantial attorneys' fee for services rendered to the class. It is apparent that the mere repetition of Petitioner's charges — even in the course of rejecting those charges — could cause unwarranted injured to those charged. It was therefore not unusual that the District Court declined to publish the claims in its several pages of findings. It was similarly appropriate that the Court of Appeals declined to make specific reference to the untoward claims, referring to them only as evidence of "unprecedented acrimony" and "aspersions". Such an appraisal was announced by the Court of Appeals only after it had "carefully weighed . . . the complete record" in its affirmance of the award in question.

The Petition reflects the ultimate manifestation of a briefing technique that has become so virulent over three years that virtually no assertion made by Petitioner may be accepted at face value. The technique first surfaced in a "brief" filed by Premier in the Court of Appeals for the Fifth Circuit in August, 1975, when it sought an unprecedented "emergency appeal on the merits" of the legal issue underlying this class action, even before any ruling had been made thereon by the

District Court. In that brief[2] Premier attacked the District Court personnel with claims of dereliction of duty; cast aspersion by innuendo upon two members of the District Bench; charged a respected professor of national repute (an expert witness in the case) with conspiring to unduly influence District Court personnel; accused the Class Representative (Dr. Julio Serrano, Medical Director of Eastern Airlines) with being a thief; and charged its own prior counsel, a respected Miami law firm, with collusion in a conspiracy against Premier. (See SA 91-2; 102-5).

That "emergency appeal" was rejected by the Court of Appeals (A 270). Thereafter, Premier proposed a class action settlement which was approved by the District Court. Prior to the fee-award hearing, however, Premier re-instituted its unwarranted personalized assaults. The District Judge tried to bring these tactics to a halt by administering a private reprimand to Permier (A 539). Even that measure did not deter the attacks, as Premier continued its distortions in its appeal of the fee awarded.

In the fee award appeal, Petitioner's assault became so relentless and insensitive that Premier even turned upon its own prior local counsel, the respected Samuel Powers,[3] portraying him as having attempted to bribe the Class Representative into dropping the class action for individual gain (See S.A. 105).

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[2]Circuit Court of Appeals, Fifth Circuit, Case #75-3294.

[3]A lawyer of such national repute that he had been previously retained to represent a former President of the United States.

Premier was given two chances to present proof of its claims, *but on each occasion declined to present any evidence.* Indeed, when the Court of Appeals remanded the case for the District Court to hold hearings or take evidence, Premier flatly responded that — even though it was propounding serious charges — it did "not intend to present any case in chief" upon an evidentiary hearing. (SA -64).

The true misfortune of Petitioner's methodology, therefore, is that it seizes upon events that are as readily attributable to good motive and intent as to bad; infers the worst and insinuates bad motives; piles inference upon inference and, magnified by innuendo, produces a final product bearing no resemblance to reality.

Finally, it should perhaps be noted that the authors of the instant Petition were not the representatives who personally participated in the events in the trial court. Accordingly, they do not write from first-hand experience or knowledge. However, that lack of knowledge is the only possible mitigating factor available in assessing the Petitioner's culpability in filing herein a "Statement" which is a selective presentation of certain facts which are distorted and presented entirely out of context. Further, most significantly, the "Statement" wholly omits to state other crucial facts which serve to expose what is, regardless of intent, the falsity of this Petition and which, as set forth below, virtually mandate denial of the Petition under Supreme Court Rule 23(4).

Omitted Matters:

Before the actual question involved in this Petition can be properly formulated, it is appropriate to consider the factual matters omitted from the Petition:

1. Petitioner charges cross-counsel were unfaithful to the class, suggesting that the action was issued only to give the class representative "leverage" to gain a settlement for himself alone. As "proof", Petitioner asserts that Respondent was not opposing Premier's motion to vacate the class action certification. The crucial *objective* facts, omitted from the Petition, are that during the Friday-Monday weekend that the decertification motion was pending before the District Court — and while class counsel were allegedly just "sitting back" awaiting a decertification order — they prepared and filed fifteen (15) pleadings, motions and memoranda on behalf of the class, investing forty (40) man-hours in this substantial endeavor. (See SA 96-99, A 360-363).

Following the District Court's denial of Petitioner's attempt to "decertify" the class action, Petitioner held an ex-parte conference with the Chief Judge of the Court of Appeals, (A 363-364), seeking the above-noted unprecedented "appeal on the merits". This tactic precipitated an emergency appellate hearing for which class counsel interrupted their vacations to attend on two days telephonic notice and at which Petitioner's attempt to frustrate the class action was soundly defeated (A 365-369; 270).

While Premier charges that class counsel "abandoned" the class, no simpler or more classic opportunity for "abandonment" could have been presented than by

the ex-parte emergency short-notice hearing established while class counsel were on vacation. Not even passing reference to these extraordinary events, which so directly substantiate Respondent's *loyalty* to the class, appears in Petitioner's "Statement".

2. Petitioner portrays the class representative's individual settlement as wrongfully distinguishable from that afforded the class. However, it fails to disclose that when the class representative obtained his settlement rights: (a) he had already been granted *summary judgment* concerning Premier's breaches of warranty (A 267); (b) he released his rights to attorneys' fees and punitive damages in regard to other improprieties committed by Petitioner, while the members of the class retained their individual claims; and (c) he was required to return his herd while the class retained theirs. These factors, not any purported impropriety, were the basis for the monetary settlement received by Dr. Serrano.

3. While Petitioner portrays the class action as being a minor claim of short duration, the class settlement was achieved only after Respondent had expended nearly 1000 hours within a six month pre-trial period of a highly complex suit, with the commencement of trial only four days away. Expert testimony established that the intensity of the litigation produced a file reflective of perhaps four to seven years' work (A 510, 532).

4. Petitioner charges that the "ERA agreement" was an illegal "Mary Carter" settlement reflecting an abuse of Rule 23 F.R.C.P., but omits to state that such agreements are *recognized* in Florida as not being contrary to public policy, *Weinstein v. National Car Rentals*, 288 So.2d 509 (Fla. 3d DCA 1973). It also omits to

state that the agreement did not dismiss a class "action", but simply dropped an alternative sub-class count against an insolvent sub-class defendant after certification of the claim against that defendant had been rendered moot by prior order of the District Court which certified the claim of the entire class against Premier.

5. Petitioner asserts that the so-called ERA agreement reflects a conspiracy to restrict testimony and to obtain "admissions" detrimental to Premier. Petitioner fails to state that the agreement and admissions in question were prompted exclusively by the request of Petitioner's own local counsel, who *consented* to the utilization of request for admissions in lieu of a deposition that had been scheduled. Petitioner further omits to state that the participants in the agreement never intended, in any way, to restrict testimony and that the agreement did not in fact restrict testimony, as the witness in question ultimately testified in direct opposition to the position of the class — thus conclusively destroying the myth of a "conspiracy". See A 543-562.

In light of the circumstances of the case, the nature of the charges, and the material omissions, the actual question presented by the Petition is:

> WHETHER CERTIORARI IS APPROPRIATE TO GRANT PETITIONER A THIRD *DE NOVO* EVALUATION OF CLAIMS THAT PRESENT ONLY ABSTRACT ISSUES PREDICATED UPON FALSE "FACTUAL" PREDICATES WHICH HAVE FAILED TO GAIN APPROVAL TO TWO LOWER TRIBUNALS.

RULES AND STATUTES INVOLVED

Respondent believes that there are no federal rules or statutes that have a bearing upon the disposition of this Petition, since it is solely concerned with a factual dispute.

In light of the "facts" as asserted by Petitioner, however, it is acknowledged that Rule 23 F.R.C.P. may be tangentially involved.

Supreme Court Rule 23(4) of the Rules, is, however, clearly applicable. That Rule provides, in pertinent part, that "failure of a petitioner to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying his petition."

STATEMENT

Petitioners' stated reasons for seeking the Writ are purportedly that the Court of Appeals' *failure to mention* alleged "tactics" will cause: (1) proliferation; and (2) repetition thereof.

Even apart from the fact that the "tactics" were non-existent, it seems self-evident that other class counsel can hardly proliferate or repeat tactics that the reported decisions do not even mention. Further reasons why certiorari is inappropriate herein will become apparent when the case is placed in its proper perspective and the actual chronology is reviewed.

Perspective of the action:

The Court of Appeals for the Fifth Circuit placed this case in its proper present context when it stated "the appeal involves nothing more than a dispute over the amount of an attorneys' fee award". The case, therefore, presents issues of importance only to the parties, and not to the public, and certiorari is not appropriate. *NLRB v. Pittsburgh S.S. Company,* 340 US 498 (1951).

While the current perspective of the case is as a private dispute over an attorneys' fee award, the original proceedings were of far greater importance and complexity. Petitioner purports to be the nation's largest integrated beef producer. (A 318). It displayed substantial fiscal growth over the past decade in large part due to methods of capital solicitation asserted to be illegal under the federal securities laws. The peculiar business operations of Petitioner involved demonstrable common

law violations such as, e.g., deceptive trade practices and breach of warranty.[3]

The last of Premier's public offerings brought significant financial misfortune to members of the public who agreed to invest in excess of $24 million in Premier's Corporation's "investment contracts", upon the inducement of credit extended in violation of the margin requirements of Regulation T, 12 C.F.R. §220. (A 115). The class action was filed and prosecuted to obtain relief for those investors and succeeded in obtaining that relief through the substantial settlement rights achieved.

Chronology:

In early 1974, due to the availability of 90% financing, Dr. Julio Serrano accepted Premier's offer to invest large sums of money into a cattle herd "investment contract".[4] Thereafter, disillusioned with Premier following a series of questionable occurrences in the investment program, Serrano consulted Respondent. (A 339). Respondent's initial review indicated that serious violations of law had occurred.

[3]Summary judgment based on breach of warranty was entered in favor of the class representative on an individual claim on August, 1976, see *supra*. These deceptive practices received nationwide attention: e.g., "Beware the Bull", an article published in *Medical Economics Magazine*, May 13, 1974 (A 566-570).

[4]The "investment contract" was of the type specified in 15 USC §77B(1) and 15 USC §78C(a)(10).

In early 1975, Premier sued Serrano. (A 339-40) Litigation proceeded at a whirlwind pace.[5] Class counsel believed that the illegality in the sale to Dr. Serrano tainted the sale to every investor. After substantial discovery, which factually confirmed the soundness of a claim for class relief, amended pleadings were filed which formally instituted the class action.[6] (A 38).

Discovery information substantiated that the Petitioner had offered and sold the subject investment contracts in contravention and evasion of instructions from the Federal Reserve Board and the Securities and Exchange Commission. (See, e.g., 162-189). In some of the sales Premier acted through Economic Research Analysts, Inc., ("ERA"), a securities broker. (A 99-100). Although an alternative sub-class claim was raised against ERA on behalf of those who had dealt with Premier through ERA, relief was sought on behalf of *all*

[5]The claim required almost unprecedented amounts of discovery within a greatly expedited pre-trial schedule. Discovery provisions of the Federal Rules were utilized in virtuoso fashion, including submission of over 150 relevant technical Interrogatories; 75 detailed Requests for Admissions; and numerous and extensive Requests for Production. Discovery necessitated analysis of technical documents comprising over 2,000 estimated pages. In total, Class counsel filed in excess of 200 separate pleadings and memoranda and raised or dealt with 17 issues which were major or of novel occurrence, or of first impression (See A 335-337).

[6]The class-action pleadings were hand-delivered to Premier on Saturday, 30 May, 1975, at Respondent's offices at the close of certain dispositions. The pleadings were then mailed (the next business day) to the Clerk of the District Court, who docketed same on 3 June, 1975. This hand-delivery was a mere courtesy to Petitioner, not part of a plan to "extract an individual settlement" for the class representative, as Premier asserts on Page 5 of the Petition.

the class against Premier as an active and *primary* violator of the Exchange Act, 15 USC Section 78, *et seq*, not on a mere "derivative basis", as is blithely asserted in the Petition.

On 10 July, 1975, the District Court granted Respondent's Motion to Certify the claim against Premier as a class action which, particularly in light of the facts then discovered, rendered certification of the ERA sub-class moot. (A 144). Premier, on that same day, suggested a settlement of Dr. Serrano's individual claims. Respondent immediately and totally *rejected* such a course of action because the class representative could not settle individual claims while a class action was pending. (SA 115).

As indicated, the request and *consent* of Premier's counsel, coupled with pre-trial deadlines, resulted in an agreement for expedited written discovery between Serrano and ERA. That agreement, dated 19 July 1975, was additionally mandated by other factual considerations. ERA was a small operation in precarious financial straits. (SA 119). Further, ERA's counsel envisioned certain defenses that might be detrimental to the class, but which had not been pled by Premier. The so-called "Mary Carter" agreement did confirm that the prior testimony of ERA's President had been accurate, but, as noted, there was never the slightest inference or discussion that future testimony was to be restricted. (SA 118-119; 407-411).

On 12 August 1975, Premier's representatives contacted Respondent in a *wholly-unsolicited* fashion and again suggested a settlement of Dr. Serrano's individual claims. (SA 115). Respondent again advised that no individual settlement could be possible, but Premier

stated it intended to move to set aside class action certification and that it was confident that it could convince the District Court to do so. Respondent reaffirmed its belief in the merit of the class action, both substantively and procedurally, but agreed to a CONDITIONAL settlement of Dr. Serrano's claims if and only if Premier finally prevailed on the issue of class-action status, so that no class would then exist. (SA 115-116).

If the letter agreement of 13 August 1975, (App 21a), was, as Petitioner now contends, Premier's attempt to unduly influence the class counsel and representative to deviate from their obligations to the class, the attempt failed: when Premier filed its Motion seeking to vacate the class certification, Respondent continued to forcefully represent the interests of the investors. The record reflects that Respondent did not "roll over and play dead" but rather continued to expend intensive efforts on behalf of the class while Petitioner's motion was pending. Nevertheless, Petitioner overlooks the *fact* of active opposition to decertification efforts and disingenuously advises this Court that it was "anticipated" that the District Court would vacate the class action certification (Petition, Pgs. 7 & 14). That "anticipation", if any there was, existed solely in Premier's mind.

After the emergency appeal was dismissed on 28 August 1975, (A 270), and with trial imminent, Premier made a further settlement proposal — this time for the benefit of the entire class. A further conditional settlement was also proposed as to those of Serrano's individual claims for which Summary Judgment had not yet been granted, notably those for fraud and punitive

damages. The settlement negotiated for the class was reasonable and included a grant to each investor of an option to either retain his herd or to require Premier to repurchase his herd over an extended five year period at prices *double* the then-current market value. Supporting documentation verified the soundness of the settlement proposal and a Joint Motion for Settlement Approval was filed. (A 281). Following a hearing the District Court indicated preliminary approval, set an evidentiary hearing, and directed that notice be sent to all class members. That notice — sent by the Court — included express references to the facts that:

1. Serrano would receive a separate individual settlement, (the true bases for which are described *supra*, p. 8), and

2. Petitioner had agreed to pay reasonable attorneys' fees to class counsel in an amount to be set by the District Court.

Following the evidentiary hearing, the Court approved the settlement. No objection was made as to the aspects of the settlement relative to Serrano's individual settlement or to the attorneys' fee provision. Ironically, strenuous objection to the class' position was made at the settlement hearing by its alleged "conspirator", ERA. (A 543-562).

Subsequently, but still prior to the fee establishment hearing, Premier attempted to *intimidate* class counsel into accepting a small fee by suggesting that it (Premier) would charge class counsel with wrongdoing or impropriety. Respondent refused to be coerced by a threat having no basis in fact. Premier then commenced

its planned "charges", while declining to present any evidence regarding its claims at the fee hearing.

A formidable cast of experts was presented by both sides at the fee hearing of 23 December 1975. All were esteemed professionals of the highest rank. The expert testifying for Premier utilized a somewhat short-sighted approach, basing his opinion essentially upon "hours" and found that the services of the class counsel warranted a fee of up to $75,000.00, (A 538) assuming that only half the time expended by Respondent had actually been necessary to prosecute the claim. The other experts focused primarily on the value established for the settlement rights obtained[7] and evaluated Respondent's services as deserving a fee ranging from $400,000.00 to $600,000.00 (A 507, 511, 516). There was one point of unanimity: no expert was of the opinion that the documents now relied upon by Premier (the ERA agreement and the so-called "individual settlement" letter) reflected conduct which should have had a bearing on the fee entitlement. See, e.g., A 512, 519, 523.

Immediately following the fee hearing, the District Court directly confronted Premier regarding its charges

[7]Estimates of value ranged from $3,000,000.00 according to Premier's own expert, (A 537) to in excess of $6,000,000.00 according to an independent certified accountant. (A 334) (Premier, characteristically, also cast vicious aspersions on the accountant's independence — charges it was forced to publicly retract when the accountant learned what had been filed by Petitioner. See A 382-383).

(A 539).[8] Premier retreated. Thereafter, in the fee award Order, the District Court found the "benefits conferred" factor inapplicable and bottomed its award on the factor of "services devoted to representing the class." (APP 3a). The award of $125,000.00 spoke for itself in regard to Premier's charges.

Premier appealed the fee Order, reasserted its charges and also contended that the Order was defective in form, since it did not expressly treat each of the twelve fee-determinant factors announced in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). On 29 December 1977, the Circuit Court ordered a limited remand so that the District Court could entertain any further proceedings it deemed appropriate and thereafter enter an Order expressly treating each *Johnson* factor. (APP 5a).

On limited remand, the District Court instructed the parties to submit proposed findings of fact and conclusions of law (SA 6). Both sides complied. Premier's proposed findings increased in intensity the acrimonious "misconduct" claims. It advised the District Court that because Premier had not "fully preceived" the entirety of the circumstances until its appeal of the fee award, it would "now" present them "more squarely" (SA 10); yet Petitioner rejected still another opportunity to present any evidence in support of its "charges." (SA 64).

[8]Premier's lawyers abjectly apologized to the District Court for Premier's accusations against the Court and its personnel in its 1975 brief to the Court of Appeals (Case #75-3254). (A 539). The Michigan counsel acknowledged that the "charges" were based upon speculation and assumption — not on evidence. Premier's Florida counsel explained that they had not read that brief before they lent their name to it, and profusely apologized (See SA 92). Significantly, Premier's Florida counsel never appeared on any subsequent brief in this cause.

The District Court then complied with the mandate of the limited remand, finding, *inter alia*, that:

a. Respondent had expended between 900 and 1000 hours in the subject cause;

b. The matter was complex, requiring a high degree of skill;

c. Much of the work was performed on an emergency basis, precluding other employment;

d. The case involved novel legal issues;

e. Respondent enjoys an excellent reputation in the community;

f. That such cases involve substantial amounts of money (AP 6a-11a).

Again implicity refuting the charges with an award of $125,000.00, the Court declined to dignify Premier's claims with any further comment.

Supplemental briefs were thereafter filed in the Circuit Court. Petitioner's baseless assault continued, and appellate litigation was thus reduced to the "unprecedented acrimony" which the Court of Appeals ascribed to "excessive zeal of counsel". The Court of Appeals affirmed the award, since the record supported the District Court's exercise of discretion. (App 12a-14a).

The instant Petition was then filed.

ARGUMENT

CERTIORARI IS NOT AVAILABLE TO GRANT PETITIONER YET ANOTHER HEARING SEEKING A *DE NOVO* EVALUATION OF ITS CLAIMS. THE PETITION PRESENTS ABSTRACT ISSUES NOT GROUNDED IN FACT, AND ESSENTIALLY PRESENTS FACTUAL ISSUES RATHER THAN ISSUES OF LAW.

Petitioner ostensibly seeks review of the propriety of certain purported class action tactics (Petition, Pg. 10). It proclaims a fear that the tactics allegedly employed may ultimately destroy litigation under Rule 23 (Petition, Pg. 11). To the contrary, Respondent has deep concern that Petitioner's "tactics" will prove injurious to class litigation; for its tactic is the technique of strenuous intimidation.[9] It is respectfully submitted that practice under Rule 23 would rapidly come to a halt if each prospective class counsel were to be forewarned that the successful prosecution of a class action and subsequent request for an attorneys' fee would expose him to the class defendant's unrelenting attack in the public records, based on unfounded inferences of impropriety, disloyalty and procedural abuses.

Petitioner asserts that there are only four possible responses to the subject matter of the Petition (Petition,

[9]We note the change in the style of this action to directly name Class Counsel as Respondent. While the change is intended to intimidate Respondent and to downplay the importance of the underlying class action, it rather serves to highlight the fact that these proceedings concern only a private dispute between two law firms.

Pgs. 12-13), but ignores the obvious fifth alternative: that the crucial "facts" presented were untrue and had been soundly rebutted by Respondent in the lower courts; that the intent and effect of the allegedly improper documents were sorely distorted by Petitioner; that the charges of "leverage", "abuse" and "disloyalty" are patently false; and that *therefore* neither court below deigned to dignify Petitioner's repeated defamations with specific comment.

Petitioner recognizes (Petition, Pg. 12) that no court over the past three years has been inclined to agree with its assessment of the record. Thus, in essentially seeking a trial *de novo* in this Court, Petitioner disregards the fact that certiorari is not available to obtain a re-evaluation of the evidence. Evidentiary evaluations fall within the functions of the District Court. *Graver Mfg. Co. v. Linde Company*, 339 US 605 (1950). This Court is a court of law, not a court sitting to correct purported errors in factual determinations. *Graver Mfg. Co. v. Linde Company*, 336 US 271 (1949). The Court does not "grant a certiorari to review evidence and discuss specific facts". *United States v. Johnston*, 268 US 220, 227 (1925).

The jurisdiction of the Court to consider cases by certiorari was established to secure uniformity of decisions between the Circuit Courts and to consider cases involving questions of importance which are required, by public interest, to be decided the Court of last resort. The certiorari jurisdiction "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing", *Magnum Import Co., Inc., v. Coty*, 262 US 159, 163 (1923), nor to resolve matters of importance only to the parties, such as in

regard to an attorneys' fee award. This Court is not the forum in which to review conflicting evidence, *NLRB v. Pittsburgh S.S. Co., supra;* nor is it appropriate to deposit voluminous documents herein and request this Court to reduce to "fact" a mass of conflicting contentions and inferences; that task is for the District Court. *Kennedy v. Silas Mason Co.,* 334 US 249 (1949). Where the proper decision of a controversy depends on questions of fact and where different interpretations may be drawn, this Court has declined to interfere even though the Petitioner contends that denial of the Writ would seriously hinder future administration of the law. *FTC v. Standard Oil Co.,* 355 US 296 (1958).

Rule 19 makes it clear that a Petition for Writ of Certiorari is addressed to the Court's sound judicial discretion, to be granted only where "special and important reasons" appear. The requirement for "special and important reasons" indicates that the problem to be resolved must be "beyond the academic or episodic". Abstract questions may present intellectually interesting problems "but this Court does not sit to satisfy a scholarly interest in such issues." *Rice v. Sioux City Memorial Park Cemetery,* 349 US 70, 74 (1954).

Insofar as the factual basis of Petitioner's claims is non-existent, the questions raised are merely academic; insofar as the questions raised are peculiar to the unique circumstances of the case, they are merely episodic. Neither instance warrants the extraordinary Writ of Certiorari.

Re: Alleged extraction of individual settlement through abuse of Rule 23.

Obviously, it is true that Rule 23 may be abused to extract settlements from class defendants. However, the District Court, the Circuit Court, and the Respondent all have rejected — and the Record refutes — Petitioner's assertion that such an abuse occurred herein. Petitioner cannot fairly explain[10] how it was that, at the very point in time where the allegedly-desired "individual settlement" was proffered, the Respondent strenuously resisted Premier's efforts by researching, preparing and serving fifteen motions and pleadings over the weekend following Premier's motion to vacate class action certification.

Even more dramatically, Premier is at a loss to advise why — given the classic factual context in which to "abdicate" its responsibility to the class without appearing to do so — class counsel went to such extraordinary lengths to successfully defend the class before the Fifth Circuit on the "emergency appeal".[11]

[10]In earlier briefs, (Premier's reply brief, Case No. 76-2049; SA 35) Premier suggested that the work product was produced only *after* the motion to vacate was already denied. It supported this fact-twisting with an argument that the "docketing dates" indicated that these pleadings were "docketed" after the Court's ruling denying decertification. It omitted to advise the Circuit Court that the actual date of service *preceded* Respondent's receipt of the District Court's Order on the Motion and that the docketing date often ran many days behind, as the District Court was sitting in one County while pleadings were being transmitted by mail to the branch of the District Court located in another County. (See SA 96 through 99). Once Respondent disclosed this distortion, Premier grew silent on the issue and wisely declined to advance that argument herein.

[11]*See p. 7 supra.*

Re: The "MARY CARTER" Settlement

Petitioner's assertion that "Mary Carter" agreements are against public policy is directly contrary to established decisional law in Florida. *Weinstein v. National Car Rentals, supra; Maule Industries, Inc. v. Roundtree,* 264 So.2d 445 (Fla. 4th DCA 1972). Indeed, it has been held that reference to such agreements as "secret" is improper and prejudicial. *Swanson v. State Farm Fire & Casualty Co.*, 349 So.2d 202 (Fla. 4th DCA 1977). Similarly inaccurate is Premier's assertion that the existence of the ERA Agreement was "secret." Premier had made charges of "conspiracy" concerning the Agreement as early as July, 1975, in the District Court, and August, 1975, in the Circuit Court. In Florida, disclosure of such agreements is required upon Motion prior to trial, but Petitioner failed to file such a Motion. The case was never tried; had it been tried the agreement would have been disclosed. Indeed, Respondent did disclose the particulars of the Agreement (A 395-399) and acknowledged its willingness to produce the document itself, requesting only that Premier file a former Motion to obtain same (A 394-396). The document was then freely produced.[12]

[12]Petitioner's asserted distaste for "secrecy" must be contrasted with: a) Premier tried to require that the extensive Pre-Trial Stipulation (which fully documented its business practices) (A 87-141) be "expunged" from the public record — physically removed from the Court file — ostensibly based upon a claim that its own highly reputed Miami attorneys had evidently conspired therein to "admit facts that were as plainly false as black is white" — but the desire to expunge the Pre-Trial Stipulation reflected an obvious attempt to preclude access by other investors who might be pursuing their individual claims. The District Court denied Premier's Motion to Expunge, but *did* order the Stipulation to be sealed (A 86); b) The ERA "secrecy provision" is the same one that Petitioner insisted upon inserting in its own settlement agreement with Dr. Serrano.

No case cited by Petitioner is applicable to the unique circumstances concerning resolution of the alternative sub-class claim raised, but not certified, against ERA. It is submitted that the procedure followed did not violate the spirit or intendement of Rule 23. The sub-class certification was moot and the settlement was not of a class "action" (Rule 23e) since the action remained pending with the full rights of the class preserved to be prosecuted against the solvent and primary class Defendant, Premier Corporation.

While Petitioner now asks this Court to issue pronouncements on the use of "Mary Carter Agreements" in class actions, the case at this point concerns only an attorneys' fee award, not rulings that the District Court *might* have made on the class action itself, *if* it had not been settled. Respondent does not comprehend how a 1978 ruling of this Court as to the use of such agreement could have any legitimate effect on the entitlement to attorneys' fees for services rendered in 1975, in a State where such agreements were then and are now permissible. At most, Petitioner's "Mary Carter" argument presents only an academic debate over an unsettled issue of extremely limited application under Rule 23 — hardly an issue which either concerns an "abusive tactic" or which creates a "special and important" basis for granting certiorari. Even if the District Court's attorney fee award could, tangentially, reflect some implicit approval of the use of the agreement in question, ". . . ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts." *Appalachian Power*

Co. v. American Institute of Certified Public Accountants, 80 S. Ct. 16 at 17 (1959).

Petitioner's assertion that the Agreement required ERA to admit materials so that same could be used to support the class's Motion for Summary Judgment against Premier is also incorrect. Nothing in the document required that any matters by "admitted"; all that was required was that the responses be expedited and, in fact, the admissions merely synthesized a variety of information previously learned through discovery. The admitted facts were all true (A 407-416; SA 118, 119) and the procedure was utilized only after Premier's counsel consented (A 415, 416).

Premier's current position is that it "was constrained to settle" because of the pending Motion for Summary Judgment on the class claim, which purportedly was enhanced by the ERA admissions; that position is contrary to its assertions in the Courts below, where it claimed that it was "forced" to settle because the District Court refused to grant a trial continuance. (A 379).

Re: Tactics "Condoned" by the Court of Appeals

Petitioner asserts that the Court of Appeals' decision "necessarily conveys the message to class litigants" that the use of the purported "tactics" will not be rebuffed and that the tactics will become "increasingly common . . . in federal litigation." (Petition Page 18). The "charges", however, have never been mentioned in a single court decision. Respondent is thus at a loss to understand how a decision which does not mention an

aspect of the case could possibly convey such a message to those who know nothing about this case.

Respondent suggests that there are two real "messages" transmitted by this case:

a. Award of attorneys' fees and factual determinations are governed by the standard of the exercise of the trial court's judicial discretion. This was the rule announced by the Circuit Court herein and is the standard applied in all Circuits. The standard is of such universal application and recognition that it could not possibly warrant the issuance of the Writ of Certiorari; and

b. Federal courts will not dignify charges lacking factual basis with further publication in their opinions, because the mere mention of the charges — even while rejecting them — would tend to cause injury to innocent parties.

Re: Estoppel

It is clear that mere dictum from the Court of Appeals is not reviewable, *Stickel v. US*, 76 S. Ct. 1067 (1956), yet Premier asks this Court to "review" matters that do not even rise to the level of mere "dictum": it requests pronouncement on legal theories that are not even mentioned in any decision below. Rather, speculating between the lines of the Circuit Court's opinion, Premier fathoms that the Court "apparently determined" that Premier's agreement to pay a fee "estopped" it from raising claims of misconduct. This argument is the quintessential strawman — created by the Petitioner solely so that Petitioner might knock it down.

Neither the questions at oral argument nor the opinion of the Circuit Court, nor any other objective criterion even faintly suggests that the Circuit Court "determined" that Premier was estopped. What is apparent is that the Circuit Court "carefully weighed the merits of the situation" based upon the "complete record" that was before it, and acted within its permitted discretionary powers to affirm the award.

Surprisingly, Premier evinces in its "estoppel" argument a purported concern over the "potential effect of disenfranchising the class". (Petition, Pg. 19). Such an announced concern must be somewhat suspect in light of Premier's continuous efforts to thwart the Classes' rights throughout the litigation, even to the extent of its ex parte emergency appeal and its self-asserted attempts to induce disloyalty by the class representative. Under the circumstances of this case, Premier's belated "concern" for the Class is more than sanctimonious; it is galling.

Petitioner recognizes that "equitable principles" should pertain to the fee award. It is submitted that Premier's self-proclaimed but futile attempt to "pay off" the class representative is reflective of a technique inimical to the healthy funtioning of the federal judicial process. Petitioner surely should not benefit from such actions.

Petitioner cites *Sprague v. Ticonic National Bank*, 307 US 161 (1939), concerning the application of equitable principles to attorneys' fee awards, but fails to acknowledge the most fundamental of all equity maxims: he who seeks equity must do so with clean hands.

In closing, Respondent notes that Rule 24 affords Petitioner the opportunity of filing a reply brief, but no similar provision is made for Respondent. While Respondent cannot predict whether any additional "charges" will be asserted in Premier's reply brief, it is respectfully submitted that all of the various claims presented in prior stages of this litigation are treated in the various filings of Respondent below, and in the voluminous record, and in the briefs and materials set forth in the supplemental appendix. Respondent invites the Court's attention to those filings should other claims be advanced hereinafter by Premier Corporation.

CONCLUSION

No conflict has been claimed in regard to the decision of the Circuit Court herein, nor does any conflict exist. The Circuit Court has not decided an important question of federal law which should be settled by this Court; it has simply decided a private issue — a dispute over attorneys' fees. None of the Rule 19 considerations exist because there is no factual basis for the claims. Accordingly, while the Petition may present academic questions of interest, without factual basis, ". . . this Court does not sit to satisfy a scholarly interest in such issues." *Rice v. Sioux City Memorial Park Cemetery, supra.*

The instant Petition seeks a trial *de novo* of factual propositions implicitly rejected below. No issue "beyond the academic or episodic" *Rice, supra,* has been advanced. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

Paul A. Louis
Sinclair, Louis, Siegel & Heath
Alfred I. duPont Building
Miami, Florida
(305) 374-0544